IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 71

DAVID EARL GUTKNECHT,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF CENTRAL COMMITTEE FOR CONSCIENTIOUS OBJECTORS, AMICUS CURIAE

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INDEX

Table of Authorities

PAGE

Cases:

PAGE

PAGE

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Interest of Amicus*

The Central Committee for Conscientious Objectors (CCCO) is a non-profit service organization founded in 1948 to assist persons who find themselves facing conflict with the power of the State as a result of conscientious objection to participation in war. In 1968, the Committee counseled over 10,000 young men with problems relating to compulsory military service. The Committee's counseling services are national in scope; CCCO has, aside from its headquarters in Philadelphia, regional offices in San Francisco and Chicago. In addition, CCCO has cooperating counselors and cooperating attorneys in every state and is widely recognized as one of the most expert and experi-

* Written consents by the attorneys for both parties have been filed with the Clerk.

enced draft counseling agencies. Of the registrants counseled by CCCO in 1968, the majority were considering or seeking conscientious objector status or student, medical, hardship or other deferments.

Amicus charges no fees for its services to registrants, attorneys, or any other persons. The views of amicus on various questions relevant to its expertise have, from time to time, been solicited by officials of the Selective Service System and by members of Congress.

Amicus also counsels those who for conscientious reasons cannot obey the draft law. Most of these men are among those who express publicly, in both traditional and unorthodox ways, their opposition to their government's involvement in the Vietnam war. CCCO, thus, has a direct interest in preserving the rights of persons who speak and act in peaceful protest, frequently religiously motivated, against war in general, or the current war in which our nation is involved.

ARGUMENT

Introductory Statement

The facts of this case, and particularly the action of petitioner's local board in declaring him delinquent because of a peaceful expression of protest, and immediately thereafter ordering him to report for induction, demonstrate the accuracy of General Hershey's description of the Selective Service statutes:

> "You can do almost anything under this law, which is more than you can say for a great many laws that are on the books."

Review of the Administration and Operation of the Selective Service System, Hearings before the House Committee on Armed Services, 89th Cong., 2d Sess. 9698 (1966) (hereinafter cited as *First House Hearings*).[1] Pursuant to this

[1] General Hershey was arguing against any substantial revisions of the Universal Military Training and Service Act of 1951. Con-

pervasive, open-ended law, petitioner was the object and subject of flagrantly arbitrary and unlawful Selective Service action. His local board attempted to deprive him of his liberty and property and, in effect, threatened his life, without affording him even elementary rudiments of due process as are otherwise alleged available to Selective Service registrants.

No one denies that the public interest sometimes requires that the liberty of an individual be curtailed. Government has an abundance of power with which to deprive individuals of their liberty. But it is only the carefully evolved standards of procedure which we insist must attend every such deprivation which legitimate that power. As Mr. Justice Frankfurter has said: "The history of American freedom is, in no small measure, the history of procedure." *Malinski* v. *New York,* 324 U. S. 401, 414 (1945) (separate opinion).

Some of the constitutional guarantees which must precede any sacrifice of an individual's liberty to a perceived public good are before this Court in this case. These guarantees are as fragile as they are crucial to freedom. They must be protected from all attempted abridgement under any disguise.

Petitioner was ordered to leave his home and friends before the time appointed by statute. He was ordered to lose his liberty and to risk his life without the benefit of the elementary constitutional safeguards guaranteed to Americans. Any suggestion that what was at stake before petitioner's local board was not such a deprivation must struggle against common sense and the sentiments and understanding of petitioner and all other Americans subject to the draft. The essence of this case is that petitioner was threatened with a two-year loss of liberty (and perhaps a loss of life) for an alleged violation of a criminal statute

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gress evidently was most responsive. See Military Selective Service Act of 1967, *passim.*

but without the benefits of a criminal trial. Moreover, petitioner was denied even those few rights of procedural due process which are generally available to Selective Service registrants before their status can be adversely affected.

A. *The Declaration of Delinquency and the Resultant Order to Report for Priority Induction Constitutes a Substantial Deprivation of Liberty, Property, and Possibly Life, and as Such Violates Constitutional Guarantees of Due Process.*

There is considerable evidence available which suggests that a local board's declaration of delinquency and the resultant induction order is a recognized deprivation of liberty. One need only look to official pronouncements of Selective Service, court decisions, the Report of the Civilian Advisory Panel on Military Manpower Procurement, and statements of the Solicitor General.

In a publication prepared by the Selective Service System, *Legal Aspects of Selective Service,* which was revised and updated in 1969 and which is the official Selective Service handbook for United States Attorneys, at page 47 it is pointed out that the Selective Service System and the Department of Justice have agreed not to prosecute under §12(a) of the Act those registrants who turn in draft cards (as contrasted to those who burn cards), but rather to have these registrants "processed administratively" by their local boards. The euphemism "processed administratively" obviously means that such registrants are to be declared delinquent, processed for immediate induction, and then prosecuted for induction refusal rather than for draft card non-possession. Since a prosecution for non-possession could lead to a deprivation of liberty, and since a local board "administrative process" also leads to a similar deprivation, this is a tacit acknowledgment that the delinquency process is punitive in operation.

This kind of government decision—that certain alleged violations of the Selective Service regulations should be "processed administratively" through delinquency declara-

tions—was one of the bases for the Second Circuit decision in *Wolff* v. *Selective Service Local Bd. No. 16,* 372 F. 2d 817 (2d Cir. 1967). That Court held the two local board respondents acted "without jurisdiction", when they declared registrants delinquent for participating in a demonstration at the office of the Local Board. The Court emphatically pointed out that "jurisdiction over offenses of this character is exclusively granted to District Courts" by virtue of Section 12 of the draft act wherein it is made a federal criminal offense to knowingly hinder or interfere in any way with the act. *Id.* at 821-822.

Similarly, the petitioner committed an alleged violation of Section 12 which provides in part that it is a federal criminal offense to violate any of the rules or regulations relating to possession of Selective Service certificates. And, like *Wolff,* petitioner was declared delinquent and punished because of his involvement with protest activity. This Court should approve the Second Circuit's holding "that it is not the function of local boards in the Selective Service System to punish these registrants . . . ." *Id.* at 822. Cf. *Oestereich* v. *Selective Service System,* 393 U. S. 233 (1968); *Clark* v. *Gabriel,* 393 U. S. 256 (1968); *National Student Association, Inc.* v. *Hershey,* 37 U. S. L. W. 2689, 2 SSLR 3030 (D. C. Cir. June 6, 1969); *United States* v. *Eisdorfer,* 37 U. S. L. W. 2621, 1 SSLR 3115, 2 SSLR 3002 (E. D. N. Y. April 16, 1969).

Further indications of Selective Service's view that delinquency is retributive is evidenced by its Delinquency Notice (SSS Form No. 304) which reads as follows (after setting forth information about the registrant):

> "1. You are hereby notified that this Local Board has declared you to be delinquent because of your failure to perform the following duty or duties required of you under the selective service law:
>
> "2. You are hereby directed to report to this Local Board immediately in person or by mail, or to take

this notice to the Local Board nearest you for advice as to what you should do.

"3. Your willful failure to perform the foregoing duty or duties is a violation of the Universal Military Training and Service Act [sic], as amended, which is punishable by imprisonment for as much as 5 years or a fine of as much as $10,000. Or by both such fine and imprisonment. You may be classified in class I-A as a delinquent and ordered to report for induction."

The language on this form conveys only one impression—that the delinquent registrant has committed a grievous wrong and must answer for such by submitting to induction or by acquiescing in the board's judgment as to how, if at all, such declaration can be cured.

The punitive nature of delinquency was conceded by the Solicitor General in this Court. See brief for United States, p. 49, *Oestereich* v. *Selective Service System,* 393 U. S. 233 (1968). And the 1967 Clark Commission, in its report to the House Committee on Armed Services, expressed its belief that delinquent registrants *should* be deprived of their liberty:

"The Panel noted with dismay the number of disloyal acts of alleged burning of draft cards or registration certificates, and that there have been reported far more incidents of burning of cards than there have been prosecutions under the law. The Panel, therefore, urged that those who destroy draft cards or certificates be *severely and expeditiously punished* under authority of existing law."

Civilian Advisory Panel on Military Manpower Procurement, Report to the Committee on Armed Services, House of Representatives, 90th Cong., 1st Sess., Feb. 28, 1967 (emphasis added).[2]

[2] The existing law at the time of this recommendation included, in addition to a specific penal provision for draft card burning,

It is incontestable that conscription, whether in time of war or peace, is *always* a severe deprivation of liberty, property and possibly life.[3] This proposition has been acknowledged, explicitly or implicitly, by the Congress, individual Senators and Congressmen, the federal courts—including this Court, and by the results of public opinion polls.

This Court in 1923 in *Meyer* v. *Nebraska,* 262 U. S. 390, 399-400, pointed out that the liberties guaranteed by the due process clause include freedom from bodily restraint, freedom to contract for work, to engage in common occupations of life, and to marry and live with one's wife and children. See *Truax* v. *Raich,* 239 U. S. 33 (1915). It is self-evident that compulsory military service imposes a substantial abridgement of these liberties. It likewise restricts freedom of speech and association [see *Shelton* v. *Tucker,* 364 U. S. 479 (1960)], inasmuch as servicemen do not have the same degree of freedom of speech and association as civilians. *United States* v. *Howe,* 17 U. S. C. M. A. 165 (1967); Kester, *Soldiers Who Insult the President,* 81 Harv. L. Rev. 1697 (1968).

In addition, the individual is subject to military commands and law which impose a more restricted standard of behavior than that available to civilians. See *Uniform Code of Military Justice, passim,* 10 U. S. C., §§801, et seq. The very existence of the federal habeas corpus writ for servicemen is testimony that continued retention in the military in certain circumstances is a deprivation of liberty. See *Jones* v. *Cunningham,* 371 U. S. 236 (1963).

The Congress, also, in its declaration of policy as enunciated in the first section of the Military Selective Service Act of 1967, acknowledged that compulsory service is a

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all of the present delinquency regulations, and all of those involved in this case.

[3] Although the deprivations are self-evident, constitutional legitimacy depends, of course, on whether they are pursuant to due process of law.

deprivation when it referred to the "obligations and privileges" of service.[4]

Conscription also can exact the maximum price. Given the fact that capital punishment has not been visited upon a convicted felon for over a year and a half, selective service is the only government institution with the power to, in effect, order a man to possible death. Comment, *The Selective Service,* 76 Yale L. J. 160 (1966); Note, *New Draft Law: Its Failures and Future,* 19 Case W. Res. L. Rev. 292 (1968). See remarks of Senator Edward Kennedy, 114 Cong. Rec. S. 1801 (Feb. 28, 1968). And if there is a more egregious deprivation than death, it may be requiring an individual to become a killer of others—the ultimate deprivation imposed by the draft.[5]

It cannot be maintained that military service is solely an attractive privilege because many young men enlist or volunteer for induction. Undoubtedly, there are a certain number of truly voluntary enlistments. But, in 1966, "(o)f the 1,090,000 men (excluding officers) who entered service in that year, 343,500 were inducted. Another 380,700 entrants enlisted *after* they were given pre-induction examinations and were found qualified. A total of two-thirds of entrants into military service, thus, were attributable to

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[4] That induction into the armed services is likewise a deprivation of property is borne out by an examination of any newspaper classified section wherein registrants about to be inducted are frantically offering to sell their automobiles and other personal possessions. At the time Gutknecht failed to submit to induction, the basic pay for an army private was $96 per month. In peacetime, it is a substantial question whether the state may raise armies by a system of in kind taxation on the services of young men which admittedly falls on only a percentage of even those fit for military service [see, e.g., Report of the National Advisory Commission on Selective Service, *In Pursuit of Equity: Who Serves When Not All Serve?,* pp. 17-29, 57-59 (1967)] rather than by financial taxation of the nation as a whole to pay the actual economic value of the services of our military men.

[5] "In general, a democratic government may be entitled to obedience, but there are limits to its justifiable demands on citizens. If it orders citizens to kill or die, it comes close to the limits that even Hobbes put down around the authority of the Leviathan." Christian Bay, quoted by Prof. Arnold Kaufman in Finn (ed.), *A Conflict of Loyalties* 252 (1968).

Selective Service in one of these direct ways. There is no way of knowing how many of the remaining 366,000 'volunteer' enlistments were draft-inspired to some extent. Confirmation of the importance of the draft to enlistments, if any is needed, may be found in 1964 Defense Department Opinion Studies of Service Personnel Who Have Enlisted. Even in this 'peacetime' army, more than 43% of the army respondents said that their enlistments were 'draft-inspired'." Davis and Dolbare, *Little Groups of Neighbors: The Selective Service System* 13 (1968), quoting from *Annual Report of the Director of Selective Service for Fiscal Year 1966,* 43 (1967). See, also, statements of General Hershey, *First House Hearings* 9625-9626; *Army Reports Enlistments Fell 9,000 Short of Its Objective in the Last Year,* New York Times, July 24, 1969, at 9, col. 1.

The April 11, 1966, issue of *Newsweek* reported that for the first time in history, while America was at war, avoidance of military service had become socially acceptable; and *Time* reported on June 3, 1966: "Still, draft ducking—or talking about draft-ducking—has become a favorite extracurricular pursuit of the Class of '66. Potential inductees kick around notions of claiming to be afflicted with everything from chronic bed-wetting to bad eyes, from homosexuality to bad backs . . . ."

A similar observation was related by Kingman Brewster, the President of Yale University and a member of the National Advisory Committee on Selective Service, in an address to the 1966 Yale graduating class. "Selective Service, in order to staff a two million man force from a two hundred million population has invented a cops and robbers view of national obligation. National morality has been left exposed to collective self-corruption by the persistent refusal of the national administration to take the lead in the design of a national manpower policy which would rationally relate individual privileges and national duty." Marmion, *Selective Service: Conflict and Compromise* 19 (1968).

An unending flow of national opinion polls and reports from college campuses demonstrates beyond any rational doubt that for the great majority of draft age men the anticipation of compulsory military service is by no means regarded as a "privilege". See, e.g., "Seventy-eight percent of persons on a national cross section who were asked by the Louis Harris Poll about the extent of draft evasion said that some or a lot of young men engaged in the practice. . . ." New York Times, June 20, 1967, at 2, col. 4. *22% Prefer Jail or Exile to Draft in the Harvard Poll,* New York Times, January 15, 1968, at 5, col. 1. *Poll of Columbia Seniors Finds 79% Oppose Draft,* New York Times, February 27, 1968, at 8, col. 3. *Teachers Ranks Swollen by Men Avoiding Draft,* New York Times, Jan. 7, 1969, at 63, col. 5. "Seventy percent of the Brandeis University senior males say they will try to avoid induction into the armed services." New York Times, March 28, 1968, at 66, col. 7.

Amicus is not here contending that the fact that conscription is regarded by both its enforcers and those upon whom it is enforced as a burden rather than a benefit, an obligation rather than a privilege, a deprivation of liberty rather than a sharing of responsibility, conclusively demonstrates that the entire institution is unconstitutional. But amicus vigorously urges that the "privilege" notion is conceptual nonsense which has no relevance to reality. At issue in this case is not the power to draft, but the power to selectively and without due process pluck a dissenter out of the general draft-eligible population and order him inducted ahead of his time, and ahead of all others similarly situated.

B. *The Arbitrary Manner in Which a Local Board Can Exercise Its Considerable Discretion to Declare a Registrant Delinquent Demonstrates That Delinquency Is a Serious Deprivation of Liberty, Property and Possibly Life.*

The decision to declare petitioner delinquent and subject him to priority induction without any rights of appeal and

without any of the requisite elements of due process rests wholly within the discretion of the local board. The important Selective Service delinquency regulation is 32 C. F. R. 1642.4(a) wherein a delinquent act is defined: "Whenever a registrant has failed to perform any duty or duties required of him under the Selective Service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be a delinquent."

A second definition of delinquent, one based on an intensive study of local board practices, is offered by the Marshall Commission: "A delinquent is any registrant who, in the *opinion of a local board,* has failed to meet the requirements of the Selective Service law." National Advisory Commission on Selective Service, *In Pursuit of Equity: Who Serves When Not All Serve?* 19 (1967) (emphasis added) (hereinafter cited as *Marshall Commission*). The Marshall Commission had other comments about the wide discretion Selective Service gives to local boards. "But because the System offers wide latitude for critical judgment by the boards themselves, this profusion of guidance (e.g., regulations, operations bulletins, local board memoranda, etc.) does not always articulate a clearly defined policy to the board. Moreover, boards across the country receive varying amounts of, and sometimes directly conflicting, guidance on the same subject." *Id.* at 27.[6]

Of course, the Selective Service System itself, freely admits to the discretion given its local boards. As General Hershey, National Director of Selective Service, stated before the House Committee on Armed Services considering the proposed 1967 Draft Act:

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[6] The Marshall Commission found so much fault with the conferring of broad unchecked discretion on local boards that this dissatisfaction was reflected in its first recommendation which was to make the controlling concept of Selective Service the "rule of law, rather than a policy of discretion." *Id.* at 4.

> "Uncertainty is the thing that keep us alive and keeps us active and keeps us thinking. As soon as you get a person with complete security and complete certainty, when he has no uncertainties of any kind, you have got a fellow, you might as well bury because there is nothing more in the world that he can do."

Hershey statement, *First House Hearings,* at 9693.[7]

The above documentation which describes the wide discretion given local boards means, among other things, that these boards have considerable unchecked power, and concomitantly, for this and other reasons, the registrant is basically powerless. In the case at bar there was nothing in petitioner's Selective Service file to indicate how or under what circumstances his Minnesota Local Board No. 115 received any information concerning his draft card. See petitioner's Eighth Circuit brief at page 37. Thus, the delinquent registrant is particularly burdened because as this Court stated in *Miranda* v. *Arizona,* 384 U. S. 436, 448 (1966), "(p)rivacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on. . . ."

We are not without judicial precedent in asserting that the delinquency regulations unconstitutionally give our country's autonomous local boards tremendous powers and wide discretion. In *United States* v. *Eisdorfer,* —— F. Supp. ——, 37 U. S. L. W. 2621, 1 SSLR 3115, 2 SSLR 3002 (E. D. N. Y. April 16, 1969), Judge Dooling observed:

> "There are no degrees of delinquency. No standards prescribe the particular occasions when the power is

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[7] The Selective Service System has further characterized its mode of carrying out its responsibilities: "The Selective Service law is deliberately designed to place responsibility for the mobilization of manpower in the local communities, with broad discretion given to members of the local boards." Selective Service System, *The Selective Service System: Its Concept, History, and Operation* 10 (1967).

to be exerted, or what findings of gravity, of willfulness, of penitence, of reparation are relevant to deciding whether or not to declare the registrant delinquent. It does not help that the regulations may not be insupportably vague in describing the duties imposed. The fault is in the absence of any standard or guide to the evaluation of the importance of the omitted duty and the guilt-character of the omission to perform it.

"If the declaration of delinquency were only a first stage to be followed by an ordered and sortable set of governmental responses, the arbitrariness of the regulations would be relieved; but the regulations contemplate only one kind of delinquency with one consequence for all cases in which the status is acted upon, and there is no alternative except complete remission, again by local board action taken at unbounded discretion." 1 SSLR at 3116.

In considering local board discretion, it is essential to bear in mind that national headquarters of Selective Service explicitly and implicitly encourages the 4,100 local boards to execute discretion in a manner which national headquarters believes will promote the National Director's concept of the "national interest." The chief vehicle for espousing the ethos of Selective Service is its monthly newsletter, *Selective Service,* which is mailed from Washington to every employee, local board member, and other participants. In each issue the National Director has a personally signed column. A random perusal of several issues would bear this fact out; a specific citation is enlightening. "It is a hope supported by some reasonable expectancy that the changing international situation will cause our public to demand more responsible conduct by our registrants and less liberality by our courts toward those failing to perform their obligations." Quoted in Davis and Dolbare, *Little Groups of Neighbors: The Selective Service System,* 45 (1968). This kind of language em-

ployed by General Hershey is an invitation to local boards to flex their muscles vis-a-vis the "irresponsible" registrant.[8]

In order to understand the *modus operandi* of a local board, and particularly the procedure employed when a local board is faced with a decision as to whether a registrant should be declared delinquent, it is essential to consider the effective power of the local board clerks, notwithstanding the absence of explicit or implicit statutory authority. See, e.g., 32 C. F. R. 1604.56; 1622.1(c); 1623.1(b); 1625.1(c); 1642.4(a). Congressman Chet Holifield, while participating in the hearings before the House Committee on Armed Services concerning the proposed 1967 draft law, commented:

> "The Civil Service Commission clerks are running these boards, not the members. The members are men working without pay. They are doing a patriotic job . . . but the bulk of the work, I would say 85 percent of the work of screening and classifying these boys are done by civil service clerks, and then when the board meets that night, they hand it to them, and they run through them and the clerk says 'this bunch on the top ought to go,' so they sign their names and they go. In many instances we are not achieving the principle that we thought we were achieving of having local businessmen and leaders in the community express evaluative judgment on the merits of specific cases. It is being done by low-paygrade clerks." *First House Hearings,* 9764.

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[8] For an illustration of the apparently ubiquitous need to satisfy the Director of Selective Service, see Mitford, "Guilty as Charged by the Judge", Atlantic, Vol. 224, No. 2, 48, 52 (August 1969). The author reports that the Justice Department official in charge admitted that the prosecution in *United States* v. *Spock, et al.*, "came about as a result of our flap with Hershey about his October 26 letter to the draft boards. The prosecution of these five was thought to be a good way out—it was done to provide a graceful way out for Gen. Hershey."

The Clark Commission which gave a more favorable treatment to Selective Service than the Marshall Commission concurred with Congressman Holifield's observations regarding the immense power of local board clerks.[9]

Account must also be taken of the universal practice of local boards in spending an infinitesimal amount of time on the case of any specific registrant. Because local board members serve as an avocation and because their businesses consume their primary time, local boards unfortunately have little time for their uncompensated activities as board members. This fact has been documented by James Davis, Jr., and Kenneth Dolbare, both consultants to the Marshall Commission.

> "In 1966 the average board in Wisconsin with from three to six thousand eligible age registrants and with three to four registrants appearing personally at each meeting, met once a month for three or four hours and handled 250 to 300 classifications per meeting."

Davis and Dolbare, *Little Groups of Neighbors: The Selective Service System* 79 (1968).[10]

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[9] "It is the clerks who marshal and assimilate all the information needed to support the proper classification of registrants. It was found that Local Boards depend almost wholly on them for a substantial percent of classification actions, i.e., those where classification is self-evident from a competent examination and assessment of the information contained in the files. The clerks are also relied on heavily for information on policy and regulations in those less evident classifications that require the application of the Board's experience, expertise, and judgment." *Report of the Task Force on the Structure of the Selective Service System,* VI-20 (1967).

[10] The Marshall Commission also noted the brevity with which local boards treat registrants' claims: "The 'anonymity' of the boards is perhaps one reason for this impression (many young registrants who met with the Commission felt that the local board clerk had awesome powers at the expense of the board); even more likely however is the method of board operation. Many board members have heavy professional and business duties. They usually meet in the evening to make their classifications." *Marshall Commission* 21. See, also, *The Selective Service,* 76 Yale L. J. 160, 176 (1966); Ginger, Minimum Due Process Standards in Selective Service Cases, 19 Hastings L. J. 1313, 1324 (1968).

Another relevant factor which suggests that a local board's *modus operandi* in processing delinquent registrants is incongruous with notions of due process is the juxtaposition between the typical registrant and the typical local board member. The Marshall Commission's exhaustive survey and statistical analysis produced the following description of the average local board member—he is 58 years old, white, middle-class, and without legal training. *Marshall Commission* 19. The Commission also found that in 1966 95% of all local board members were 40 years old or older and that 45% of local board members were 60 years old or older. *Marshall Commission,* Appendix, Sec. 1, 73-74.

Thus, a registrant may be declared delinquent if he "fails or neglects to perform any duty required of him under the provisions of the selective service law" and this determination as to whether he violated the law will be made by a much older person, not his peer, who is without legal training. It is respectfully submitted that this unbounded discretion combined with the absence of any standards whatsoever and the actual practices of local boards, must result in a judicial determination of the unconstitutionality of the delinquency regulations.

C. *The Punitive Nature of Delinquency Declaration and Priority Induction Is Further Aggravated by the Total Absence of Effective Judicial Review.*

It is a truism of Selective Service law that the scope of judicial review of the classification decisions and induction orders of local boards is exceedingly narrow. See *Estep* v. *United States,* 327 U. S. 114 (1946); Military Selective Service Act of 1967, 50 U. S. C. A. App. §460 (b)(3); *United States* v. *Gearey,* 379 F. 2d 915 (2d Cir. 1967), cert. den. 389 U. S. 959. It has been somewhat imprecisely but most aptly described as judicial review which is the "narrowest known to the law", *Robertson* v. *United States,* 404 F. 2d 1141, 1144 (5th Cir. 1968), a descrip-

tion which the Selective Service System heartily approves. See *Legal Aspects of Selective Service, supra,* at 52-3. That this narrow scope of judicial review has caused considerable injustice because courts have been left powerless to correct obviously unfair administrative action—in a large number of cases has been documented by many commentators. Comment, *Fairness and Due Process Under the Selective Service System,* 114 U. Pa. L. Rev. 1014, 1024, 1049 (1966); Comment, *The Selective Service System: An Administrative Obstacle Course,* 54 Calif. L. Rev. 2123, 2141 (1966); Note, *Changes in the Draft: The Military Selective Service Act of 1967,* 4 Colum. J. of L. and Soc. Prob. 120, 156-160 (1967). Amicus is convinced that sooner or later this Court will have to cope with the issue of the proper scope of judicial review in Selective Service cases. See 4 Davis, Administrative Law, §29.07, at 151-52 (1958); Jaffe, *Judicial Review: Question of Fact,* 69 Harv. L. Rev. 1020, 1050 (1956).

Presumably, one of the justifications for judicial toleration thus far of the narrow review of Selective Service actions is that the administrative procedure normally contemplates a certain amount of fact finding with some opportunities provided to the registrant to persuade the decision makers. See *Estep* v. *United States, supra,* at 116, 137; *Witmer* v. *United States,* 348 U. S. 375, 376-377 (1955). A further theoretical prop, for a system which provides some administrative review but very limited judicial review, is that the end result of the system is not considered a sanction in the customary sense.

Perhaps this is true with regard to the normal workings of Selective Service, in accordance with the established doctrine that an induction order is not punitive. But an induction order as a result of a declaration of delinquency is punitive and nothing but punitive. See *argument, supra,* pp. 4-10. Consequently, it is one thing to say that minimal judicial review is constitutionally tolerable where there is no punishment involved but only a fair selection process

which must be shared by all. It is completely different where what is involved is no longer a fair selection process, but the deliberate extraction of certain individuals, via the delinquency process, for priority induction.

Finally, in this particular case, the registrant has been removed even one dimension further from any semblance of due process. Because he was already classified I-A at the time of the delinquency declaration, he was denied by the Selective Service regulations even the minimal amount of due process which is customarily available when a registrant who has a classification other than I-A is declared delinquent, and is reclassified I-A. 32 C. F. R. §1642.14. This petitioner, therefore, has had no administrative due process and he has had no effective judicial review. The District Court in this case, feeling itself bound to follow the "basis in fact" test, rendered itself impotent from exercising any effective judicial function. It became, in fact, merely an instrument for certifying a felony conviction which had been previously imposed by the petitioner's local board without any due process at all.

This Court should decide, at the very least, that a broader standard of judicial review must be required in delinquency cases. Otherwise, the entire process is worthy of portrayal as a scene in the theatre of the absurd.

D. *The Proper Role of Delinquency Proceedings.*

Amicus urges that the holding of the Second Circuit in *Wolff* v. *Selective Service Local Bd. No. 16, supra,* should be adopted by this Court. It is not the function of the Selective Service System, via the institution of delinquency proceedings, to try and to punish registrants for alleged violations of the Selective Service laws. Nor is it the function of the Selective Service System to impose "civil sanctions" whether they be analogized to contempt, or otherwise. The Congress has not authorized, nor does it have the constitutional power to authorize, an administrative agency to assume the role of a judicial tribunal via

the invocation of the word "delinquency" or any other word magic.

Amicus urges that the only constitutionally tolerable function which delinquency proceedings can serve is as a formal means of warning a registrant that he is about to be reported to the United States Attorney for an alleged violation of Selective Service law, but that if he chooses he may, at his option, accept priority induction in lieu thereof. Since certain constitutional rights can presumably be knowingly waived, it would not be constitutionally improper for a registrant to choose to forego a criminal trial and to rather accept, at his own volition, the "civil penalty" of priority induction. But unless the choice is for the registrant to make, the entire process of delinquency can be, often is, and in this case certainly has been converted into a Star Chamber for the sending of a man to jail without any hearing at all.

CONCLUSION

Amicus respectfully reiterates that this case does not involve the question of whether the draft is or is not punishment. This case does not involve the question of the quantum of due process to which registrants are normally entitled in the Selective Service System. Nor does this case involve the question of the proper scope of judicial review of administrative action in the normal Selective Service case.

But regardless of whether or not the draft is punishment, it most assuredly is punishment to scoop up a political or religious dissenter, out of his normal turn, and send him off to war before all others. To be called in one's turn and to serve honorably may be both a privilege and an obligation. But to be branded a delinquent, particularly because of some act of dissent, and then with the brand emblazoned on oneself, to be immediately removed from civilian life

and placed under military command is nothing less than punishment. Various totalitarian and semi-totalitarian governments in different parts of the world have, from time to time, in fact utilized induction into the military as a means of punishing dissenters. It is reputed to be the normal course of events in certain Latin American dictatorships. But until the events which precipitated the decision of the Second Circuit in *Wolff* v. *Selective Service Local Bd. No. 16, supra,* and the aggravated repetition of these events which precipitated this case and the companion cases, punitive reclassification and priority induction had not been a feature of the American scene.

There are many things that can be criticized about American society. Throughout our history dissenters have been deprived of their liberty in a myriad number of ways. But the recent epidemics of punitive reclassifications and priority inductions represent the first occasion when the drafting power has been used as an instrument for punishing dissenters.

Amicus respectfully prays that in its decision in this case, this Court should reach the merits of the underlying issues and should declare the entire reprehensible practice to be in violation of constitutional guarantees.

Respectfully submitted,

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